

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASOCIACION de COMPOSITORES y EDITORES
de MUSICA LATINOAMERICANA
Petitioner

v.

COPYRIGHT ROYALTY TRIBUNAL
Respondent

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) Case No. _____
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PETITION FOR REVIEW

Asociacion de Compositores y Editores de Musica Latinoamericana ("ACEMLA"), by its attorneys and pursuant to Section 810 of Title 17 of the United States Code (17 U.S.C. Section 810), and Rule 15(a) of the Federal Rules of Appellate Procedure, hereby petitions the Court for review of the Copyright Royalty Tribunal's Final Determination of the Distribution of the 1982 (remand) and 1983 Jukebox Royalty Funds, Docket Nos. 83-2/84-2 83 JD, published November 19, 1985, 50 Fed. Reg. 47577. The referenced Final Determination is appended hereto.

Respectfully submitted,

ASOCIACION de COMPOSITORES y EDITORES
de MUSICA LATINOAMERICANA

By


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By


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December 10, 1985

during 1985. Such adjustments will be made as the data become available.

Should a different solution be reached in consultations concerning Category 361, further notice will be published in the Federal Register.

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the Federal Register on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924), December 14, 1983, (48 FR 55607), December 30, 1983 (48 FR 57584), April 4, 1984 (49 FR 13397), June 28, 1984 (49 FR 26622), July 16, 1984 (49 FR 28754), November 9, 1984 (49 FR 44782), and in Statistical Headnote 5, Schedule 3 of the Tariff Schedules of the United States Annotated (1985).

Walter C. Lenahan,

Chairman, Committee for the Implementation of Textiles Agreements.

*Commissioner of Customs,
Department of the Treasury, Washington, DC
20229*

Dear Mr. Commissioner: This directive further amends, but does not cancel, the directive of December 21, 1984, which established limits for certain categories, produced or manufactured in Taiwan and exported in 1985.

Effective on November 20, 1985, the directive of December 21, 1984 is hereby further amended to include the following limits for cotton textile products in Categories 360 and 361.

Category	12-month limit ¹
360.....	789,584 numbers.
361.....	995,024 numbers.

¹ The levels have not been adjusted to account for any imports exported after December 31, 1984. During the January-August 1985 period, charges for Category 360 have totaled 350,156 numbers; for Category 361, 638,941 numbers.

Textile products in Categories 360 and 361 which have been exported to the United States before January 1, 1985 shall not be subject to this directive.

Textile products in Categories 360 and 361 which have been released from the custody of the U.S. Customs Service under the provisions of 19 U.S.C. 1448(b) or 1484(a)(1)(A) prior to the effective date of this directive shall not be denied entry under this directive.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553.

Sincerely,

Walter C. Lenahan,

Chairman, Committee for the Implementation of Textiles Agreements.

[FR Doc. 85-27529 Filed 11-18-85; 8:45 am]

BILLING CODE 3510-DR-M

COPYRIGHT ROYALTY TRIBUNAL

[Docket No. 83-2/84-2 83 JD]

Final Determination of the Distribution of the 1982 (Remand) and the 1983 Jukebox Royalty Funds

AGENCY: Copyright Royalty Tribunal (Tribunal).

ACTION: Notice of final determination.

SUMMARY: The Tribunal announces the adoption of its final determination in the proceeding concerning the distribution to certain copyright owners of jukebox royalty fees deposited for 1982 and 1983 performances.

FOR FURTHER INFORMATION CONTACT: Edward W. Ray, Acting Chairman, Copyright Royalty Tribunal, 1111 20th Street, NW, Washington, D.C. 20036.

SUPPLEMENTARY INFORMATION:

Authority

17 U.S.C. 116(c)(3) authorizes the Copyright Royalty Tribunal (Tribunal) to distribute royalty fees paid by jukebox operators to certain copyright owners and performing rights societies. The procedure for distribution of the jukebox royalty fees is set forth at 17 U.S.C. 116(c)(4) and reads as follows:

The fees to be distributed shall be divided as follows:

(A) To every copyright owner not affiliated with a performing rights society, the pro rata share of the fees to be distributed to which such copyright owner proves entitlement.

(B) To the performing rights societies, the remainder of the fees to be distributed in such pro rata shares as they shall by agreement stipulated among themselves, or, if they fail to agree, the pro rata share to which such performing rights societies prove entitlement.

(C) During the pendency of my proceeding under this section, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

This Proceeding

This proceeding is a consolidation of two proceedings. The Tribunal takes up the portion of the 1982 jukebox royalty fund which was remained for further proceedings by the United States Court of Appeals for the Second Circuit, *A.C.E.M.L.A. v. Copyright Royalty Tribunal*, 763 F. 2d 101 (2d Cir. 1985) (*ACEMLA*). The Tribunal also takes up the distribution of the 1983 jukebox royalty fund.

The Claimants in the 1982 remand are: Latin American Music, Latin American Music Co., Inc., Asociacion de Compositores y Editores de Musica Latinoamerica (*ACEMLA*), ASCAP, BMI,

and SESAC, Inc. The claimants in the 1983 distribution are: Michael Walsh, Latin American Music, Latin American Music Co., Inc., Asociacion de Compositores y Editores de Musica Latinoamerica (*ACEMLA*), Italian Book Company, ASCAP, BMI, and SESAC, Inc.

The controversies in the 1982 remand and in the 1983 distribution are the same: Latin American Music, Latin American Music Co., Inc. and *ACEMLA* collectively claim 5% of both funds. ASCAP, BMI, and SESAC, Inc., collectively claim 100% of both funds, except for a small award to Italian Book Company. The 5% in controversy is described as Spanish-language musical works.

Background and Chronology

The 1982 remand. The Tribunal published its final determination of the 1982 jukebox distribution proceeding on August 31, 1984. 49 FR 34555 (1984). It determined that no award would be given to Latin American Music, Latin American Music Co., Inc., or *ACEMLA* (collectively, LAM or the LAM claimants). LAM appealed the determination. The United States Court of Appeals for the Second Circuit remanded the case to the Tribunal for further proceedings. The Court stated that the Tribunal had not addressed in its final determination LAM's assertion that they were performing rights societies and that it would assume for the purpose of the appeal that the three LAM claimants were performing rights societies. However, the Court specifically stated that it did not foreclose "further examination of this issue by the CRT on the remand."

ACEMLA, 763 F. 2d at 108. Operating from its assumption, the Court stated that the Tribunal should have distributed the royalty fees to the performing rights societies if they all agreed, but if they failed to agree, to award the pro rata share to which such performing rights societies proved entitlement. The Court found that there was not a complete settlement among performing rights societies. Yet the Court found that in the final determination the Tribunal only analyzed the submissions of LAM, and made no findings regarding the submissions of ASCAP, BMI, and SESAC, Inc., the Tribunal having relied instead on the settlement between ASCAP, BMI, and SESAC, Inc. Determining this to have been not in accordance with section 116(c)(4)(B), the Court remanded the case.

The 1983 jukebox distribution proceeding. The Tribunal declared a

controversy in the distribution of the 1983 jukebox fund on November 5, 1984, 49 FR 44231 (1984), and ordered that justification of claims be submitted by December 4, 1984. The Tribunal also found that ASCAP, BMI, and SESAC, Inc., (hereinafter A/B/S) had entered into an agreement concerning the distribution of the 1983 jukebox fees. *Id.*

On January 7, 1985, the Tribunal held a pre-hearing conference. At the conference, it was established that there was a controversy as to 5% of the fund representing Spanish-language musical works.¹ The question arose as to the best criteria for resolving the controversy. The parties were given an opportunity to file by letter recommended criteria. The Tribunal received letters from LAM and A/B/S on February 14 and 15, 1985. LAM recommended a survey of jukebox establishments conducted jointly by all the claimants. A/B/S recommended a survey of radio, or a survey of radio and other media, which the Tribunal, by analogy, could apply to jukebox performances. On May 16, 1985, the Tribunal issued two fact-finding letters. One letter sent to the LAM claimants asked LAM to detail why they believed they were performing rights societies, and how the joint survey of jukeboxes recommended by LAM would be conducted and how much it would cost. The second letter was sent to A/B/S. The Tribunal asked how it could be assured that A/B/S' recommended survey of radio and other media performances would be impartially conducted considering it would be based on information internal to A/B/S. Replies to the Tribunal's fact-finding letter were received June 24, 1985.

The Consolidated Proceeding. On May 30, 1985, the Court of Appeals had remanded the 1982 proceeding partially over the question of whether the LAM claimants were performing rights societies. On June 24, 1985, the Tribunal received LAM's response to the fact-finding letter of May 16, 1985. It stated that Latin American Music and Latin American Music Co., Inc. were not performing rights societies, but that ACEMLA was a performing rights society.² The response did not provide

the Tribunal with enough information on which to make a finding on the status of ACEMLA. It was the Tribunal's conclusion that the 1983 jukebox proceeding could no longer be resolved through a "paper" proceeding, and that since the issues and parties to the 1982 remand and the 1983 proceeding were virtually the same, the consideration of the two cases should be consolidated in one proceeding. The Tribunal subsequently issued its *Order Consolidating Proceeding and Setting Future Procedural Dates*, 50 FR 31645 (August 5, 1985). The Tribunal ordered written direct cases to be submitted on September 13, 1985 on two issues: the status of the claimants not already defined in the Copyright Act as performing rights societies, and proof of entitlement should all the performing rights societies fail to agree. The Tribunal agreed with the claimants that surveys of jukebox establishments or survey of radio performances and other media would be useful criteria. The Tribunal also suggested to the parties that submission of sworn statements from jukebox operators and submission of hit songs charts would also be useful, but specifically did not restrict evidence to only those four types. Hearings on the evidence presented by the claimants were held September 30, October 2, and October 3, 1985. On October 17, 1985, the Tribunal received a stipulation from all parties agreeing to an award for 1983 of \$1500 to Italian Book Company. On October 25, 1985, the record was closed.

Statutory deadline. Section 804(e) of the Copyright Act requires the Tribunal to render its final decision in distribution proceedings within one year of publication in the Federal Register that a controversy exists. The controversy in the 1983 jukebox distribution proceeding was declared November 5, 1984. This final determination does not meet the one year time limit imposed by section 804(e). The Administrative Conference of the United States has issued recommendations concerning statutory time limits. 1 CFR 305.78-3, 43 F.R. 27509 (June 26, 1978). It recommends that, "(I)t should be recognize(d) that special circumstances such as a sudden substantial increase in caseload, or complexity of the issues raised in a particular proceeding, or the presence of compelling public interest considerations may justify an agency's failure to act within a predetermined time. . . . (A)n agency's departure from the legislative timetable (should) be explained in current status reports to affected persons or in a report to Congress." *Id.*, at par. 4.

The Tribunal considers that the delay in rendering a decision in the 1983 jukebox distribution proceeding to allow it to consider both the 1982 remand and the 1983 distribution in one proceeding justifies missing the statutory deadline by a short period of time. It was the Tribunal's belief at the beginning of the 1983 proceeding that it could resolve the status of the claimants and the controversy over Spanish-language music by a "paper" proceeding, but the Court's decision, in the Tribunal's view, required detailed fact-finding that could only be achieved by an evidentiary hearing. Additionally, while theoretically, there is no time limit on the consideration of a remanded case, and therefore, the Tribunal could have resolved the 1983 proceeding first in order to meet the deadline, the interests of justice and the conservation of the resources of the claimants and the Tribunal mandated consolidation of the two proceedings. Further, the Tribunal believes that its narrow missing of the statutory deadlines will not have any effect on the claimants, and that, indeed, the Tribunal has kept within the spirit of Congress' mandate by acting on the jukebox controversies as expeditiously as possible.

Findings of Fact

Michael Walsh. Michael Walsh filed a claim in the 1983 jukebox distribution proceeding. Michael Walsh subsequently did not file a justification of claim as required by the Tribunal's rules. 37 CFR 305.4. Michael Walsh did not file in response to the *Order Consolidating Proceeding and Setting Future Procedural Dates*, 50 FR 31645 (August 5, 1985).

Italian Book Company (IBC). The Tribunal received a stipulation October 17, 1985 signed by ASCAP, BMI, SESAC, Inc., LAM, and IBC that agreed to a settlement of \$1,500 to IBC for the 1983 jukebox fund. In the stipulation, IBC represented that it is a copyright owner, and not a performing rights society.

Latin American Music, Latin American Music Co., Inc. and ACEMLA (LAM or LAM claimants)

Organizational structure of the LAM claimants. Mr. Luis Raul Bernard (hereinafter, Bernard) was the sole witness for the LAM claimants. Tr. 174-374. Bernard stated that he was born in Puerto Rico and moved to New York City in 1952. Tr. 193. Bernard stated that about 1985 he established OTOAO Records International and that this company is a wholesale and retail records store doing business on the upper west side of Manhattan in New York City. Tr. 208-209. Bernard stated

¹ LAM put in a claim of 5% of the jukebox fund based on their Spanish-language catalogue. A/B/S put in a claim of 100% based on their total catalogue. The Tribunal has never found that 5% of the musical work played on jukeboxes in the United States is Spanish-language music. The 5% figure is simply LAM's claim against the royalty fund.

² LAM also withdrew all claims on the part of Latin American Music and Latin American Music Co., Inc., lodging all claims with ACEMLA. Nonetheless, the Tribunal took evidence on all three entities

that before April, 1981, he established Latin American Music as a sole proprietorship, i.e., Luis Raul Bernard d/b/a Latin American Music. Tr. 204. Bernard stated that in April, 1981 he incorporated Latin American Music to be called Latin American Music Co., Inc., but maintains that Latin American Music still exists as a separate entity. Tr. 188, 204, 220, and LAM Direct Case, Attachment 1. Latin American Music Co., Inc., is incorporated for the purpose "To engage in the business of licensing performance, synchronization and other rights under copyright in musical compositions, and to do all acts necessary or related to the conduct of such business." LAM Direct Case, Attachment 1. Bernard stated that ACEMLA is the assumed name of Latin American Music Co., Inc. and that it is a division or subsidiary of Latin American Music Co., Inc. Tr. 180-181. The certificate of assumed name was filed with the New York State Department of State Corporations and State Records Division on April 24, 1984. LAM Direct Case, Attachment 1, as amended October 24, 1985. However, Bernard stated that ACEMLA was formed in 1980 or earlier. Tr. 178, 183, 207. Bernard stated that ACEMLA was formed to divide many of the rights that Latin American Music Co., Inc. holds, and that ACEMLA holds the performing rights to Latin American Music Co., Inc. and others. Tr. 181. Bernard stated that ACEMLA is a performing rights society. Tr. 175.

The offices of Latin American Music, Latin American Music Co., Inc., and ACEMLA are in the OTOAO Records International store in Manhattan. Tr. 211. Bernard stated that these four entities share five employees. Tr. 203-213-214. Bernard stated that he is the sole proprietor of Latin American Music, the President and sole stockholder of Latin American Music Co., Inc. and principal of ACEMLA. Tr. 178, 204.

Agreements of the LAM claimants with copyright owners and performing rights societies. Bernard stated that LAM had agreements with many copyright owners and performing rights societies. Tr. 182. At the request of the Tribunal, LAM submitted a list of those entities, and copies of executed and unexecuted agreements. Submission of LAM, October 16, 1985, translations provided October 24, 1985, translations provided by A/B/S, Reply Findings, Appendix A. The list included: Latin American Music Co., Inc. (New York), International Music Company (New York), Westside Music Publishers Corp. (New York), Editorial Internacional de Musica, Ltd. (EDIMUSICA, Columbia),

Editorial Dominicana de Musica (Dominican Republic), Consorcio de Editores del Peru (CONEDISA, Peru), HONY, S.A. (Mexico), Sociedades de Autores y Compositores Acuatorianos (SADRAM, Ecuador), Sayce (Ecuador). Id. LAM filed executed and unexecuted agreements with Westside Music Publishers Corp., EDIMUSICA, Editorial Dominicana de Musica, CONEDISA, and SADRAM. Id. The five agreements were with Latin American Music Co., Inc. Id. LAM did not file agreements with International Music Company, or HONY, S.A. Id. LAM filed a letter and a telegram regarding an agreement with Sayce mentioning ACEMLA. The letter and telegram were dated July 3, 1985 and September 25, 1985, respectively. Id.

In addition, LAM submitted exemplars of the contracts they use in their agreements. The contracts sometimes include a rider which, among other things, addresses the performing rights. LAM Direct Case, Attachment 2, translations provided by LAM, translations provided by A/B/S Exhibit 10X. Paragraph 5 of one of the riders used by LAM reads, "The composer declares that he is not a member of any composers organizations or society controlling his performing arts, that all such performing rights are exclusively controlled as part of this contract, that the composer is aware that his performing rights, in their totality, will be administered and under the name of the editor, Latin American Music Company, Inc., LAM and/or Asociacion de Compositores y Editores de Musica Latinoamericana. (ACEMLA)." Id. This is the only reference to ACEMLA in any contract or agreement provided by LAM. LAM also submitted an ACEMLA information form. Id.

Bernard was asked whether the ACEMLA information forms were used in either 1982 or 1983. Bernard could not represent that they were. Tr. 250. Bernard stated several times in the proceeding that he had difficulty with dates. Tr. 193, 258, 367. The rider, which contained Paragraph 5, has the date 1985 in the second line. LAM Direct Case, Attachment 2. Bernard could not say whether the rider was drafted in 1985 or before. Bernard could not represent that the rider was used in 1982 or 1983. Tr. 268.

LAM represented that "ACEMLA is authorized to license and publish performances of all nondramatic music works on behalf of Latin American Music and Latin American Music, Inc. (sic)." Submission of LAM, July 24, 1985. Bernard was not sure whether the authorizations to ACEMLA were in

writing. Bernard did not have any copies of the authorizations. Tr. 225. Bernard represented that any agreement with Latin American Music Co., Inc. would act automatically as an authorization to ACEMLA to license the performing rights of the underlying copyrights because ACEMLA is an assumed name of Latin American Music Co., Inc. Tr. 225.

Bernard was asked by the Tribunal if he saw any difference between a music company in the United States obtaining the subpublishing rights from a foreign publishing company, and a performing rights society in the United States obtaining the right to license the performing rights of a foreign publisher. Tr. 245-247. Bernard stated that a performing rights society is such an entity that has control of performing rights. Tr. 247. Bernard was asked by the Tribunal whether a music publishing company could have control of performing rights. Bernard stated yes. Tr. 247.

Agreements of copyright users to pay a license fee to LAM. LAM submitted correspondence to five radio stations (WKDM, Carlstadt, New Jersey; WADO, New York, New York; WNWK, Newark, New Jersey; WJIT, New York, New York; WSKQ, New York, New York), two television stations (WNJU-TV, Channel 42, New York, New York; WXTV, Channel 41, Paterson, New Jersey), and the Public Broadcasting Service (PBS) as evidence of LAM's attempts to license the public performance of LAM's works. LAM Direct Case, Attachment 3. However, Bernard stated that in 1982 and 1983, LAM did not have any signed written license agreements with any radio station, television station, bar, grill, nightclub, college or school. Tr. 229. Bernard stated that LAM did not receive any performing rights royalties in 1982 or 1983. Tr. 229.

Distribution System. Bernard stated that at the time of distribution, LAM would keep 50% of the royalties, and would distribute 50% of the royalties. Tr. 232. Bernard stated that distribution is based on actual air play from radio stations and television stations logs. Tr. 234. Bernard stated that LAM has not received any logs because LAM does not currently license any stations. Tr. 235. Bernard stated that LAM monitors five stations that broadcasts Spanish-language music in the New York City area. Tr. 236. Bernard stated LAM keep the tapes for enforcement purposes currently, and intends to use them for distribution purposes in the future. Tr. 238. Bernard stated that LAM has not brought any infringement actions to

date. Tr. 238, 240. Bernard stated that LAM did not make any distributions to any publisher or composer in 1982 or 1983. Tr. 230.

Proofs of Entitlement. In the 1982 and the 1983 proceeding, LAM offered demographic evidence as one basis of entitlement. In 1980, the United States Hispanic population was 14.6 million or 6.4% of the total U.S. population. By 1985, it was estimated by the U.S. Census Bureau, that the Hispanic population would rise to 17.6 million or 7.4% of the U.S. population. LAM 1982 justification of claim, LAM 1983 justification of claim, Exhibit D. An advertisement by Discos CBS International asserted that sales in 1981 of Spanish-language records were over \$125 million. LAM 1983 justification of claim, Exhibit F. Broadcasting Yearbook for 1985 listed 176 Spanish-language format radio stations in the United States (including Puerto Rico). LAM Direct Case, Attachment 9.

In the 1982 proceeding, LAM asserted that it represented 20,000 copyrighted musical works. LAM 1982 justification of claim. In the 1983 proceeding, LAM asserted that it represented 30,000 copyrighted musical works. LAM 1983 justification of claim. LAM submitted to the tribunal a computer list of approximately 9,000 song titles which it stated were a partial list of the works they represent. LAM 1982 justification of claim, Exhibits A & B.

LAM submitted xerox copies of 37 45 RPM labels of works they represent were copyrighted before 1984 as evidence of the production and distribution of the works in their catalogue. LAM Direct Case, Attachment 4. LAM submitted hit song charts from Billboard, Canales Magazine, Radio Hit. GUIA Radial, and El Diario de New York. LAM 1982 justification of claim, Exhibit D, LAM 1983 justification of claim, Exhibit G—NN, LAM Direct Case, Attachments, 5, 6 and 7. LAM indicated on those charts the songs which they represent. Id. LAM submitted clearance sheets sent by a Spanish-language format radio station to ASCAP indicating that the station was considering playing some works represented by LAM. LAM Direct Case, Attachment 11.

LAM submitted 12 certified statements from jukebox operators or owners of establishments containing jukeboxes in 1982 and 1983. LAM Direct Case, Attachment 12. Bernard stated that the statements were obtained by an agent of LAM in the Philadelphia area. Tr. 353. All statements were notarized by the same notary public. LAM Direct Case, Attachment 12, Tr. 362. Some statements indicated that the jukeboxes

were licensed, when, in fact, they were not licensed. LAM Direct Case, Attachment 12, A/B/S Exhibit 17X.

At the direction of the Tribunal, LAM submitted a list of their most-performed musical works totalling 179 songs. LAM submission of August 9, 1985. ASCAP and BMI each performed their own survey of the list. The survey they performed were the same type of survey they would conduct for any one of their members in the normal course of business to determine the entitlement of their members to performance royalties. A/B/S Direct Case, Testimony of Alan H. Smith, p. 4, Testimony of Paul S. Adler, p. 2, Comments of A/B/S, filed September 3, 1985. ASCAP asserted that if LAM were part of ASCAP's claim, and if it is assumed that ASCAP's share of the joint music claim is 50% (which is only an assumption for the purpose of the analysis), based on the radio performances of LAM's 179 songs, LAM would receive \$326 for 1982 and \$267 for 1983 from ASCAP. Comments of A/B/S, September 3, 1985, Tr. 111-113. BMI asserted that if LAM were part of BMI's claim, and if it is assumed that BMI's share of the joint music claim is 50% (which is only an assumption for the purpose of the analysis), LAM would receive \$38.60 for 1982 and \$47.50 for 1983 from BMI. Comments of A/B/S, September 3, 1985, Tr. 145-148. ASCAP asserted that LAM's share of ASCAP's award would go down to \$157 for 1982 and \$112 for 1983 if performances in all media were considered, not just radio. Comments of A/B/S, September 3, 1985, Tr. 111-113.

A/B/S conducted a limited survey of 76 jukeboxes in Hispanic neighborhoods in four cities with sizable Hispanic populations, New York, Los Angeles, San Antonio, and Miami. A/B/S Direct Case, Testimony of Gloria Messinger, pp. 4-9. Ms. Messinger, who oversaw the survey, could not represent that this was a statistically valid, representative random sample. Id., p. 6. Of the 11,592 song titles listed on the 76 jukeboxes, A/B/S found 45 listings of 23 works represented by LAM. Id., p. 8, Tr. 36. Working from an assumption that jukeboxes in Hispanic neighborhoods represent approximately 5% of the jukeboxes in the United States, A/B/S calculated an award to LAM of \$564 for 1982 and \$555 for 1983. Id., p. 9.

ASCAP, BMI and SESAC, Inc.

Proof of entitlement. Anticipating that if the Tribunal found that ACEMLA was a performing rights society in 1982 or in 1983 that there would not be a complete settlement among performing rights societies, the Tribunal ordered that ASCAP, BMI, and SESAC, Inc. submit

proof of entitlement for the entire amount of the 1982 remand and the 1983 distribution. *Order Consolidating Proceeding and Setting Future Procedural Dates*, 50 FR 31645 (August 5, 1985).

Regarding proof of entitlement to all of the 1982 (remand) and 1983 jukebox funds, Ms. Messinger, Managing Director of ASCAP, BMI and SESAC, Inc. hold an overwhelmingly dominant position in the music industry, and that virtually every piece of copyrighted music performed in the United States is licensed by one of the three organizations. A/B/S Direct Case, Testimony of Ms. Messinger, p. 2. Ms. Messinger stated that the combined annual revenues of ASCAP, BMI and SESAC, Inc. based on their activities in licensing public performances of musical works were approximately \$350 million for both 1982 and 1983. Id., p. 3.

Regarding proof of entitlement to Spanish-language music, A/B/S submitted a list of foreign societies in countries where Latin-language music is composed which they represent in the United States: Sociedad Argentina de Autores y Compositores de Musica (SADAIC, Argentina), Sociedad Boliviana de Autores y Compositores de Musica (OSBODAYCOM, Bolivia), Sociedade Arrecadadora de Direitos de Execucao Musical do Brasil (SADEMBRA, Brazil), Sociedade Brasileira de Autores, Compositores e Escritores de Musica (SBACEM, Brazil), Sociedade Brasileira de Autores Teatrais (SBAT, Brazil), Sociedade Independente de Compositores e Autores Musicais (SICAM, Brazil), Uniao Brasileira de Compositores (UBC, Brazil), Departamento de Derecho de Autor (DAIC, Chile), Sociedad de Autores y Compositores de Colombia (SAYCO, Colombia), Sociedad de Autores y Compositores de Musica (SACM, Mexico), Autores Paraguayos Asociados (APA, Paraguay), Asociacion Peruana de Autores y Compositores (APDAYC, Peru), Filipino Society of Composers, Authors and Publishers (FILSCAP, Philippines), Sociedade Portuguesa de Autores (SPA, Portugal), Sociedad Puertorriquena de Autores, Compositores y Editores de Musica (SPACEM, Puerto Rico), Sociedad General de Autores de Espana (SGAE, Spain), Asociacion General de Autores del Uruguay (AGADU, Uruguay), Sociedad de Autores y Compositores de Venezuela (SACVEN, Venezuela). A/B/S Evidentiary Statement, December 4, 1984.

A/B/S also submitted a list of the most performed Spanish-language works in the repertoires. A/B/S submission,

August 9, 1985. A/B/S submitted a BMI publication purporting to show the substantial representation of Latin works in the United States by A/B/S. A/B/S Direct Case, Testimony of Ron Anton, Exhibit RA-2.

Conclusions of Law

Status of Claimants

Italian Book Company is not a performing rights society. The Tribunal accepts the representation of IBC that it is not a performing rights society.

None of the LAM claimants were a performing rights society in 1982 or 1983. The Tribunal concludes from the evidence established on the record that Mr. Bernard began a music publishing company sometime before April 1981, that he incorporated in April, 1981, and that he filed an assumed name for a subdivision of his music publishing company to be called ACEMLA in April, 1984. Since LAM has rescinded its claim that either Latin American Music or Latin American Music Co., Inc. were performing rights societies in 1982 and 1983, and since ACEMLA did not even legally exist until 1984, none of the LAM claimants were a performing rights society in 1982 and 1983.

However, Mr. Bernard claims that ACEMLA began in 1980 or earlier. The record is totally devoid of any activity by ACEMLA before 1984. ACEMLA did not license a single user, receive a single royalty or make a single distribution in 1982 and 1983. Not a single agreement with a domestic or foreign entity refers to ACEMLA. They only refer to Latin American Music Co., Inc. Only LAM's letter and telegram with Sayce mentions ACEMLA, and significantly, they are dated July 3, 1985 and September 25, 1985. The rider which includes paragraph 5, the only mention of ACEMLA in all the agreements or exemplars submitted by LAM, is dated 1985, and Mr. Bernard could not represent that the rider was used in 1982 or 1983. Finally, Mr. Bernard could not represent that the ACEMLA information form was used in 1982 and 1983. The only indicia of the existence of ACEMLA before April, 1984 are the claims filed by LAM with the Copyright Royalty Tribunal in January 1983 and January, 1984 for the previous calendar years. However, New York State law requires filing for a certificate of assumed name before the transaction of any business: "No person shall hereafter (i) carry on or conduct or transact business in this state under any name or designation other than his or its real name, or (ii) carry on or conduct or transact business in this state as a member of a partnership, unless: . . . (b)

such person, if a corporation, shall file, together with the fees as set forth in subdivision five of this section, in the office of the secretary of state a certificate setting forth the name or designation under which business is carried on or conducted or transacted . . . N.Y. [General Business Law] Section 130 (McKinney 1985).

Mr. Bernard believes, alternatively, that any entity that seeks to enforce performing rights is a performing rights society. This was revealed in answer to the Tribunal's question regarding the difference between a U.S. subpublisher representing a foreign publisher, and a U.S. performing rights societies' collection of royalties for a foreign publisher. Mr. Bernard answered that both the U.S. subpublisher and the U.S. performing rights society would qualify as performing rights societies. Clearly, this can not be true. A copyright owner, before he or she assigns the rights in the copyright to someone else, may enforce the performing rights. So may a music publishing company after it has been assigned the rights from the copyright owner, and so may a U.S. subpublisher. In fact, Congress recognized this by, among other things, establishing the first category of copyright owners to collect royalties for performances on jukeboxes and then the second category, of performing rights society. Mr. Bernard's view of the law would make every individual copyright owner, or music publisher, a performing rights society.

The Tribunal does not reach the question of whether ACEMLA was a performing rights society in 1984 or is one today. However, supposing that this question may arise again when the Tribunal takes up subsequent jukebox distribution proceedings, we have several unanswered questions: Does the filing of a certificate of assumed name create a performing rights society? Can a performing rights society be a division of a music publishing company or must it be a separate entity? Noting that ACEMLA did not license a single user, receive a single royalty or make a single distribution in 1982 and 1983, must there be some activity by an organization other than the mere setting up of a legal entity to make it a performing rights society? On the other hand, the Tribunal has resolved the issue of "bigness" which was raised at hearings. The Tribunal's interest in determining the status of claimants is strictly ministerial. Congress has required that the Tribunal must take up the claims of copyright owners first, and performing rights societies second. Defining the claimants is therefore necessary. However, the Tribunal has no interest in determining

whether a performing rights society is big enough and effective enough to attract copyright owners, or to carry out its goals. We do not seek to give to or withhold from any entity a "government stamp of approval" that it is a "good," "effective" or any other kind of performing rights society, and we do not expect this determination or any future determination to be used in that way. We are simply interested in determining whether an entity comes into one category or another. Consequently, evidence that the number of employees of LAM was too few, or that the size of their offices was too small, was not considered relevant.

Award to Copyright Owners (Sec. 116(c)(3)(D))

Michael Walsh has shown no entitlement. Michael Walsh did not justify his claim, therefore the Tribunal will make no award to him.

Italian Book Company will be awarded \$1500 for 1983. The Tribunal accepts the agreements of all parties to an award of \$1500 for 1983.

Latin American Music Co., Inc. has shown entitlement to 0.15% of the jukebox funds for 1982 and for 1983. Having concluded that none of the LAM claimants were performing rights societies, the Tribunal takes up the LAM claimants as copyright owners first, the rest to be distributed to the performing rights societies. The Tribunal has already concluded that ACEMLA did not legally exist in 1982 or in 1983. The Tribunal also believes that despite LAM's assertion that the sole proprietorship of Latin American Music still conducts business, we have no evidence of its activity aside and apart from Latin American Music Co., Inc. It is Latin American Music Co., Inc. which has the agreements with the foreign publishers and/or societies, and any entitlement that has been shown, we believe, has been shown by Latin American Music Co., Inc.

In the 1982 final determination, the Tribunal rejected Latin American Music Co., Inc.'s claim to entitlement based on any inference from the demographics of the United States. To assume that Latin American Music Co., Inc. deserves 5% of the jukebox royalty fund because 6-7% or more of the United States population is Hispanic would require the Tribunal to conclude that Latin American Music Co., Inc. represents at least 80% of the Spanish-language music in America. Yet, the record shows there are 176 Spanish-language format radio stations in the United States and Latin American Music Co., Inc. does not license a single one. The Tribunal reaffirms its rejection

in the 1982 final determination of LAM's claim based on the size of the Hispanic population in the United States.

However, by virtue of the 1982 remand, LAM has had a further opportunity to show that there is some value to the works in its catalogue: It has agreements with some foreign entities; it has a catalogue of thousands of songs; it has demonstrated the production and distribution of some of its songs on 45 RPM records; it has demonstrated some popularity of its songs on hit songs charts; it has been demonstrated by A/B/S that there has been some air play and some jukebox play of LAM's songs. The Tribunal could give only slight credit to the certified statements of jukebox operators or jukebox establishment owners because of the flaws noted in the findings; they all were notarized by the same notary public and contained inaccurate representations concerning the licensing of the jukeboxes.

The question for the Tribunal is how to quantify the award to LAM which would be reasonable. We are faced with the impossibility of determining a perfectly accurate mathematical approach to LAM's award.

We start with A/B/S' analyses, but find they are probably too low. While not doubting the general validity of ASCAP and BMI's radio surveys, they may only be applied by analogy to jukebox play. They can never be said to perfectly represent jukebox play. We find some significance that when A/B/S performed a limited jukebox survey, with all its imperfections, the resulting award to LAM becomes higher than just a reference to radio play. We would prefer to find an award to LAM higher than either A/B/S' radio survey or its jukebox survey. We are aware that in the case of an individual claimants with limited resources, it would be very hard to ascertain the extent of the jukebox play in Hispanic neighborhoods, and we expect that better efforts and better evidence will be attained in future proceedings. But in the present proceedings, Latin American Music Co., Inc. has been successful in placing before the Tribunal evidence, which in total, establishes the likelihood of jukebox play which deserves some minimal award. Consequently, we are awarding Latin American Music Co., Inc. 0.15% of the jukebox fund, rejecting both A/B/S' contention of a virtually de minimis award and LAM's contention of 5% of the universe of musical works on jukebox. We believe that this award is squarely within the "zone of

reasonableness" recognized by the Court.³

We noted earlier that on June 24, 1985, LAM withdrew its claim for Latin American Music and Latin American Music Co., Inc., and placed all its claim under ACEMLA. Procedurally, therefore, LAM would be entitled to no award, the Tribunal having found that ACEMLA did not legally exist in 1982 or 1983. However, the Tribunal sees its role primarily as a finder of facts. We have been persuaded that Latin American Music Co., Inc. existed in 1982 and in 1983 and represents a catalogue of some value. We are inclined to disregard the mistaken pleading in order to recognize the reality of jukebox play in 1982 and 1983 and to compensate those copyright owners whom Latin American Music Co., Inc. represents for the royalties which they have earned.

Award to Performing Rights Societies (Sec. 116(c)(3)(C))

The rest of the jukebox fund will be distributed to ASCAP, BMI, and SESAC, Inc. Having concluded that ACEMLA was not a performing rights society in 1982 or in 1983, there are only three performing rights societies before the Tribunal, ASCAP, BMI, and SESAC, Inc. These performing rights societies have reached a complete settlement on the remainder of the jukebox fund. Consequently, the Tribunal has not weighed any of the evidence regarding A/B/S. Section 116 clearly encourages settlements and instructs the Tribunal to distribute the jukebox fund to the performing rights societies after it has determined the proper distribution to copyright owners, but to weigh their entitlements should they fail to agree. They have not failed to agree, and we make no inquiry into their evidence.

Allocations

Accordingly, the Tribunal awards 0.15% of 1982 jukebox royalty fund to Latin American Music Co., Inc. This represents the only change from the 1982 final determination. Further, for the 1983 jukebox royalty fund, the Tribunal makes no award to Michael Walsh, awards \$1500 to Italian Book Company, awards 0.15% to Latin American Music Co., Inc., and awards the rest to ASCAP, BMI and SESAC, Inc.

Commissioner J.C. Argetsinger did not participate in this determination.

³ *Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal*, 720 F. 2d 1295, 1304 (D.C. Cir. 1983).

Dated: November 13, 1985.

Edward W. Ray,

Acting Chairman.

[FR Doc. 85-27478 Filed 11-18-85; 8:45 am]

BILLING CODE 1410-09-M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Advisory Committee on Women in the Service (DACOWITS); Meeting

AGENCY: Defense Advisory Committee on Women in the Services (DACOWITS).

ACTION: Notice of Meeting.

SUMMARY: Pursuant to Pub. L. 92-463, notice is hereby given of a forthcoming meeting of the Executive Committee of the Defense Advisory Committee on Women in the Services (DACOWITS). The purpose of the meeting is to review the Recommendations, Requests for Information, and Continuing Concerns made by the Committee at the 1985 Fall Meeting; discuss current issues relevant to women in the Services; and complete any unfinished business and on-going projects pertaining to the 1985 Executive Committee.

All meeting sessions will be open to the public.

DATE: December 9, 1985, 1:30-5:00 p.m. and December 10, 1985, 9:30-11:30 a.m.

ADDRESS: OSD Conference Room 1E801 #1, the Pentagon, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Major Marilla J. Brown, Executive Secretary, DACOWITS, OASD (Force Management and Personnel), The Pentagon, Room 3D769, Washington, DC 20301-4000; telephone (202) 697-2122.

SUPPLEMENTARY INFORMATION: Persons desiring to (1) attend the Executive Committee Meeting or (2) make oral presentations or submit written statements for consideration at the Meeting must notify the point of contact listed above no later than November 25, 1985.

Patricia H. Means,

OSD Federal Register Liaison Officer,
Department of Defense.

November 14, 1985.

[FR Doc. 85-27589 Filed 11-18-85; 8:45 am]

BILLING CODE 3810-01-M

Defense Science Board Task Force on Special Operations; Meeting

AGENCY: Office of the Secretary, DOD.

CERTIFICATE OF SERVICE

I, Bruce A. Eisen, do hereby certify that on this 10th day of December, 1985, I sent a copy of ACEMLA's "Petition For Review" via United States first class mail, postage prepaid, to each of the following:

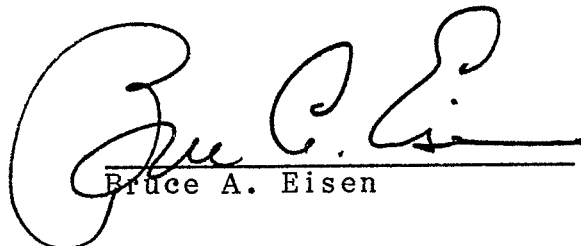
Mr. Bernard Korman, Esquire
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New York, New York 10019

Dennis Angel, Esquire
350 Fifth Avenue
New York, New York 10118

Mr. Edward W. Ray*
Acting Chairman
Copyright Royalty Tribunal
1111 20th Street, N.W.
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Bruce A. Eisen

* Hand delivered

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December 10, 1985

HAND DELIVERED

The Clerk
United States Court of
Appeals for the District
of Columbia Circuit
Constitution Avenue &
John Marshall Pl., N.W.
5th Floor
Washington, D.C.

Re: Final Determination of the Distribution of the
1982 (remand) and 1983 Jukebox Royalty Funds
Docket Nos. 83-2/84-2 83 JD

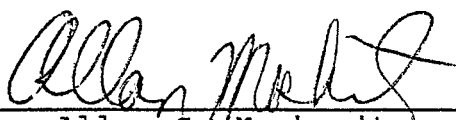
Dear Sir:

Pursuant to Section 810 of Title 17 of the United States Code we are filing herewith an original and three copies of Asociacion de Compositores y Editores de Musica Latino-americana's "Petition for Review" with respect to the Copyright Royalty Tribunal's decision in the above-captioned proceeding.

Should any questions arise with respect to this matter, please contact the undersigned counsel.

Respectfully submitted,

SHRINSKY, WEITZMAN & EISEN, P.C.

By 
Allan G. Moskowitz

Enclosures